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Ludwig Teller

Member of the New York bar

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FEDERAL INTERVENTION IN LABOR DISPUTES AND COLLECTIVE BARGAINING—THE HUTCHESON CASE

Ludwig Teller*

THE very face of federal law governing labor unions and labor activities has been transformed by the recent holding by the United States Supreme Court in *United States v. Hutcheson*,¹ that the Sherman,² Clayton³ and Norris⁴ Acts must be read not separately but as "interlacing statutes," and that labor activity unenjoinable under the Norris Act is likewise and by the same token uncensurable under the Sherman Act. In so deciding, the high court has drastically affected the meaning of the Sherman Act, and the extent of its application to labor activities. New life has been given to the Clayton Act, and many heretofore authoritative cases, both those decided by the Supreme Court of the United States⁵ and those announced by lower federal courts,⁶ have been overruled. Broad scope has been accorded to the Norris Act. And the Sherman Act as applied to labor cases has been substantially restricted if not almost read out of the statute books. Not without divergence and sharp dissent in connection with crucial labor law issues was this transformation wrought. The implications of the *Hutcheson* case are the subject of this article.

* Member of the New York bar; author, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING* (1940).—*Ed.*

¹ 312 U. S. 219, 61 S. Ct. 463 (1941), affg. (D. C. Mo. 1940) 32 F. Supp. 600.

² 26 Stat. L. 209 (1890), 15 U. S. C. (1934), §§ 1-7.

³ 38 Stat. L. 730 (1914), 15 U. S. C. (1934), §§ 12-17, 28 U. S. C. (1934), §§ 381-383, 386-390a, 29 U. S. C. (1934), § 52.

⁴ 47 Stat. L. 70 (1932), 29 U. S. C. (1934), §§ 101-115.

⁵ See, for example, *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 47 S. Ct. 522 (1927); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72 (1921); *Loewe v. Lawler*, 208 U. S. 274, 28 S. Ct. 301 (1908). See also *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940).

⁶ The following, among others: *Michaelson v. United States*, (C. C. A. 7th, 1923) 291 F. 940, reversed on other grounds in 266 U. S. 42, 45 S. Ct. 18 (1924) (strike for wrongful purpose illegal); *Central Metal Products Corp. v. O'Brien*, (D. C. Ohio 1922) 278 F. 827 (secondary strike unlawful); *Ferguson v. Peake*, (App. D. C. 1927) 18 F. (2d) 166 (picketing in the absence of a strike unlawful); *Columbus Heating & Ventilation Co. v. Pittsburgh Bldg. Trades Council*, (D. C. Pa. 1927) 17 F. (2d) 806 (strike to unionize bad); *Fehr Baking Co. v. Bakers' Union*, (D. C. La. 1937) 20 F. Supp. 691 (secondary boycott unlawful); *Pacific American Shipowners' Assn. v. Maritime Federation of the Pacific Coast*, (D. C. Wash. 1939), 1 C. C. H. LABOR CASES 1013 (secondary strike illegal).

STATEMENT OF FACTS AND RATIONALE

The *Hutcheson* case, which involved an indictment under the Sherman law, arose out of a jurisdictional controversy between two unions affiliated with the American Federation of Labor. Both the millwrights of the United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as the Carpenters) and the machinists of the International Association of Machinists (hereinafter referred to as the Machinists) asserted the exclusive right to perform the work of erecting and dismantling machinery in the plant of Anheuser-Busch, Inc., a beer brewing company which purchased a large quantity of raw materials and sold substantially all of its product without the state where it maintained its principal place of business. It leased to Gaylord Container Corporation land and buildings adjacent to the brewery. Anticipating increases in the demand for its product, Anheuser-Busch contracted with Borsari Tank Corporation of America for the erection of additional buildings. Apparently by coincidence, Gaylord entered into a contract with L. O. Stocker Company for the erection of an additional office building on the leased premises. Upon the refusal of Anheuser-Busch to employ millwrights instead of machinists, the Carpenters called a strike, commenced to picket Anheuser-Busch, Gaylord and their construction companies, and to request union members and their friends to refrain from buying Anheuser-Busch beer. The indicated defendants were officers and agents of the Carpenters. The district court sustained their demurrers to the indictment,⁷ and the Supreme Court of the United States affirmed. The opinion of the Court was written by Justice Frankfurter, with whom concurred Justices Douglas, Black and Reed. A concurring opinion was written

⁷ *United States v. Hutcheson*, (D. C. Mo. 1940) 32 F. Supp. 600. The district court so held for two reasons, the first of which anticipated the Apex case [*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940)], and the second of which was partly the ground of decision of the Supreme Court in the *Hutcheson* case:

1. "The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy." 32 F. Supp. at 602.

2. "In *Duplex Printing Press Company v. Deering* [254 U. S. 443, 41 S. Ct. 172 (1921)], the Supreme Court held that section 20 of the Clayton Act was intended to place certain restrictions upon the general operation of the anti-trust laws, as well as to restrict the right to injunctions. At that time the section was interpreted to apply only to disputes involving employers, employees and persons seeking employment, and immunity was not extended to labor organizations or individuals not parties to the dispute. By the passage of the Norris-La Guardia Act, such restriction in the scope of the Clayton Act is no longer in force (*New Negro Alliance v. Sanitary Grocery Co.*) [303 U. S. 552, 58 S. Ct. 703 (1938)], and protection is now extended to persons and organizations not immediate parties to the dispute." 32 F. Supp. at 603.

by Justice Stone and a dissenting opinion by Justice Roberts, in which the Chief Justice joined. Justice Murphy took no part in the disposition of the case. The ninth member of the Court, Justice McReynolds, had theretofore resigned and the President had not yet appointed his successor.

The Supreme Court reasoned that the labor activities involved in the case, e.g., striking, picketing and peacefully requesting others to boycott Anheuser-Busch, were included among the acts permitted to labor in connection with a "labor dispute" under section 20 of the Clayton Act, and that the Sherman Act written in 1890 could not be utilized to censure such activities, since section 20 of the Clayton Act passed in 1914 contained a provision to the effect that "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."⁸ The defendants could invoke the Clayton Act, which was limited to quarrels between an employer and his employees,⁹ even though they might be "outsiders" to the immediate dispute, because in 1932 Congress in the Norris Act expressed the public policy of the United States anew by defining a "labor dispute" to include any employment controversy "regardless of whether or not the disputants stand in the proximate relation of employer and employee."¹⁰ The Court recognized that the Norris law was an act "explicitly dealing with the further withdrawal of injunctions in labor controversies," but refused to believe that "that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison."¹¹

There was no necessity for the Court to consider any other law but the Sherman Act to reach a decision in the case. Whatever the legality of the given conduct, the case involved simply a strike, picketing and boycotting designed not to control or restrict the interstate market within the meaning of the *Apex*¹² case, but intended to aid in the resolution of a local conflict. For this reason alone, Justice Stone argued that the indictment should have been dismissed. It is difficult

⁸ 38 Stat. L. 738 (1914), 29 U. S. C. (1934), § 52.

⁹ "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless, etc." 38 Stat. L. 738 (1914), 29 U. S. C. (1934), § 52.

¹⁰ 47 Stat. L. 73 (1932), 29 U. S. C. (1934), § 113.

¹¹ *United States v. Hutcheson*, 312 U. S. 219 at 234-235, 61 S. Ct. 463 (1941).

¹² *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940).

if not impossible to gainsay the force of Justice Stone's reasoning, for the same Court had but shortly theretofore announced the "interstate market" test in the *Apex* case. A sit-down strike in a Pennsylvania manufacturing establishment was there held not to come within the purview of the Sherman Act, although (1) concededly unlawful, (2) there was interference not only with manufacturing but also with interstate shipment of manufactured goods, and (3) the employer's relations with his employees "affected" commerce within the meaning of the National Labor Relations Act¹³ because he shipped a portion of his product in interstate commerce.¹⁴ The Sherman Act, the Court held, applies to such a case only as involves an intent to control prices in states other than that in which the activities sought to be censured are carried on. Justice Frankfurter voiced no dissent in the *Apex* case.¹⁵ Problems concerned with jurisdiction are generally ancillary to all others. The *Hutcheson* case could have been decided without recourse to the Clayton Act and without mention of the Norris Act.

Because the case was one involving a secondary boycott, and for the further reason that the Norris Act should not, being an anti-injunction statute, and nothing more, be construed to palliate the criminality of conduct condemned under the Sherman Act, Justice Roberts wrote that the indictment was legally sufficient. He made no mention of the *Apex* case and of the jurisdictional barrier which, under that case, separated illegal conduct from the sanction of the Sherman Act. Indeed, a novice to the subject might well conclude, from a reading of Justice Roberts' dissent, that all secondary boycotts are punishable without more under the Sherman Act.

The cogency of the dissent is further impaired by the fact that the *Hutcheson* case involved no secondary boycott. The labor activity carried on against Gaylord, Anheuser-Busch's lessee, and its construction company, was plainly illegal since they were not involved in the controversy except by reason of the fact that Gaylord was Anheuser-

¹³ 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1939), §§ 151-166.

¹⁴ *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 58 S. Ct. 656 (1938); *N. L. R. B. v. Bradford Dyeing Assn.*, 310 U. S. 318, 60 S. Ct. 918 (1940); *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 59 S. Ct. 668 (1939).

¹⁵ The opinion of the Court in the *Apex* case was written by Justice Stone, and concurred in by Frankfurter, Douglas, Black, Reed and Murphy, JJ. A dissenting opinion by the Chief Justice was joined in by Justices McReynolds and Roberts. See, for analyses of the *Apex* case, Steffen, "Labor Activities in Restraint of Trade," 50 *YALE L. J.* 787 (1941); Landis, "The *Apex* Case," 26 *CORN. L. Q.* 191 (1941); Gregory, "The Sherman Act v. Labor," 8 *UNIV. CHI. L. REV.* 222 (1941); Cavers, "Labor v. The Sherman Act," 8 *UNIV. CHI. L. REV.* 246 (1941).

Busch's lessee and next door neighbor. Picketing of its premises or other labor activity carried on against it or its construction company was not the equivalent of any secondary boycott. A secondary boycott, as the Supreme Court of the United States has more than once stated, exists when a buyer or a seller or other person economically related to the allegedly unfair employer is threatened with strikes, picketing or boycotting if he fails to discontinue his relationship with the employer involved in the primary labor dispute.¹⁶ Labor's point of view in connection with the secondary boycott is that one who takes advantage of or profits by the unfair labor condition of another should not be permitted to argue that he is a stranger to the primary dispute.¹⁷ But neither Gaylord nor its construction company were profitably connected with Anheuser-Busch. They were utter strangers to the controversy. One was Anheuser-Busch's next door neighbor; the other was not even that. The labor activity carried on against them was without color of justification in terms of labor law. The guilt of those who carried on such labor activity was mitigated neither by the Clayton Act nor the Norris Act, and their indictment under the Sherman Act might have been proper had it not been, as Justice Stone pointed out, that the jurisdictional test announced in the *Apex* case was lacking, and were it not also for the difficulty of proving that the activity was part of a plan to restrain trade. The defendants' punishment under such circumstances would presumably follow under state law.

This leaves for consideration the refusal to work for Borsari Tank Corporation, the independent contractor employed by Anheuser-Busch to erect additional buildings, and the interference with the construction of the buildings resulting from picketing of the premises. Justice Roberts thought this was a secondary boycott. Both Justice Frankfurter and Justice Stone, on the other hand, the latter more clearly than the former, said that Anheuser-Busch and Borsari Tank Corporation were one and the same as concerned the character of the labor activity which the defendants directed.¹⁸ There is no novelty in

¹⁶ "A secondary boycott . . . is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury." *Truax v. Corrigan*, 257 U. S. 312 at 330, 42 S. Ct. 124 (1921). See also, in accord: *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 47 S. Ct. 522 (1927).

¹⁷ See 1 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, §§ 103, 122, 145 (1940).

¹⁸ The opening sentence of Justice Frankfurter's opinion in the *Hutcheson* case was as follows: "Whether the use of conventional, peaceful activities by a union in

this disregard of conventional common-law relationships. Referents in labor law such as "independent contractor" or "corporate veil" have proved unduly restrictive and their ordinary consequences abandoned where patently a basic identity of parties exists.¹⁹ Borsari Tank Corporation, though called an independent contractor, was engaged in the construction of Anheuser-Busch's buildings on Anheuser-Busch's land.

BASIC ASSUMPTIONS OF THE CASE

It appears, then, that the *Hutcheson* case is one involving a strike, primary picketing and primary boycotting carried on by a labor union in furtherance of a jurisdictional controversy. The indictment alleged and realleged²⁰ that the activity was not related to a "legitimate object" for which employees might organize and strike, and further alleged²¹ that the indicted defendants (the general president, general representative, secretary and business representative respectively of the Carpenters) were not employees of Anheuser-Busch. There was nothing in the Sherman Act which distinguished between legitimate and unlawful labor activities, nor was there anything in the act which denied to strangers rights accorded to the immediate parties to an industrial controversy. But the Court found in the Clayton Act and in the Norris Act provisions which resolved in the defendants' favor any

controversy with a rival union over certain jobs is a violation of the Sherman law, is the question." 312 U. S. at 227. Justice Stone's statement was that "With respect to Borsari and Stocker the indictment does no more than charge a local strike to enforce the jurisdictional demands upon Anheuser-Busch by the refusal of union members to work in the construction of buildings for Anheuser-Busch or upon its land. . . ." 312 U. S. at 240.

¹⁹ *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939), holding that a manufacturer having no employees of his own may be picketed in spite of the general rule forbidding picketing in such a case [*Thompson v. Boeckhout*, 273 N. Y. 390, 7 N. E. (2d) 674 (1937)] where collective bargaining in the industry has created a custom relating him to his independent contractor, who did employ workingmen. In *Newark Ladder & Bracket Sales Co. v. Furniture Workers Union*, 125 N. J. Eq. 99, 4 A. (2d) 49 (1939), picketing by striking employees of one corporation was permitted in front of the premises of another corporation not engaged in a labor dispute, where both corporations were operated as a single enterprise by common owners. See also *Ritholz v. Andert*, 303 Ill. App. 61, 24 N. E. (2d) 573 (1939). The National Labor Relations Board has been consistent in its disrespect of the corporate veil. See 2 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, § 267 (1940). See also Wolfe, "Determination of Employer-Employee Relationships in Social Legislation," 41 COL. L. REV. 1015 (1941).

²⁰ In the District Court of the United States for the Eastern District of Missouri, Eastern Division, September Term, 1939, *United States of America v. William L. Hutcheson et al.*, Indictment, No. 2131, p. 14, ¶ 27, p. 18, ¶ 34.

²¹ *Id.*, p. 13, ¶ 27.

doubts as to their guilt under the Sherman Act. This finding the Court made with the aid of three basic assumptions, the first and third of which, it is submitted and will hereafter be demonstrated, were incorrect, while the second was unnecessary. The first assumption was that section 20 of the Clayton Act made no differentiation between legitimate and illegal labor activity. The second was that labor organizations and labor organizers are "outsiders" to a labor controversy and hence not entitled, in the light of the restricted definition of the words "labor dispute" in the Clayton Act, to the benefit of its provisions. The third assumption was that the Norris Anti-Injunction Act amended both the Clayton and Sherman laws, and thereby, because of the more extensive definition of the term "labor dispute" which that act employed, graced the defendants with permission to do almost anything so long as it could be called labor activity, and so long as they did it alone and not in conjunction with non-labor groups.

The Scope and Purpose of the Clayton Act

The *Duplex*²² case had established that the Clayton Act did not withdraw from judicial scrutiny the purpose of the given labor activity, Justice Pitney in that case declaring that there was nothing in section 6 of the act to exempt a labor organization or their members from responsibility "where it or they depart from its normal and legitimate objects," albeit no line was drawn in the case to separate the legitimate from the unlawful. Nor did the provisions of section 20 help labor's cause, because "The emphasis placed on the words 'lawful' and 'lawfully,' 'peaceful' and 'peacefully,' and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful."

In the *Hutcheson* case, on the other hand, Justice Frankfurter construed section 20 to mean precisely the opposite. "So long as a union acts in its self-interest and does not combine with non-labor groups," he said, "the licit and the illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."²³ A jurisdictional controversy was thus protected by the Clayton Act in the same manner

²² *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 at 469, 473, 41 S. Ct. 172 (1921).

²³ *United States v. Hutcheson*, 312 U. S. 219 at 232, 61 S. Ct. 463 (1941).

and to the very same extent as a controversy between an employer and his employees related to terms and conditions of employment.

Interesting in the extreme would be the field of speculation over which the legal realist might range in comparing the mental bents of Justice Pitney in the *Duplex* case with those of Justice Frankfurter in the *Hutcheson* case.²⁴ The events of the two decades which separate the two decisions are clearly reflected in the result of the *Hutcheson* case. Without saying so, it repudiated the *Duplex* decision. It may well be questioned whether the bald words of the Clayton Act support the act of repudiation. The agitation against the labor injunction which followed the *Debs*²⁵ case is generally well known, to be sure, and it is equally well known that the Clayton Act was the result of that agitation. Most of us recall or have read about the enthusiasm with which labor greeted the Clayton Act.²⁶ And it is generally conceded that the *Duplex*,²⁷ *Bedford*²⁸ and *American Steel Foundries*²⁹ cases dashed labor's hopes and expectations. But is it fair to say that all this was the fault of the Supreme Court of the United States? Why, if Congress intended to provide labor with a carte blanche in connection with labor activities, did it qualify its every grant, both those in section 6 and those in section 20 of the Clayton Act, with the words "legitimate," "peaceful" and "lawful"? And why was labor so exuberant over the Clayton

²⁴ Justice Pitney's opinion in the *Duplex* case reveals the following underlying notions: (1) that the Clayton Act had no intention of interfering with the traditionally-settled judicial prerogative of questioning the purpose for which the given labor activity is carried on; (2) that equal protection of the laws would be impaired by legislation which accorded to labor unions or their activities privileges not given or denied to others; (3) that natural rights in property and business would be curtailed by such mischievous dogma as permitted unrestricted interference with the right to a free and open market; (4) that sovereignty is irreconcilable with the provocation of strife in large industrial areas by private groups in pursuance of a quarrel with existing law.

Justice Frankfurter, on the other hand, saw in section 20 of the Clayton Act the crystallization of an intent to exclude the judiciary from peaceful activity carried on by labor in an area of industrial conflict. See FRANKFURTER and GREENE, *THE LABOR INJUNCTION* (1930). See also *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568 (1941). The effort to exclude the judiciary from the area of industrial conflict appears paradoxically to reflect a distrust in the field of labor law of the very same judicial process invested with the prerogative of judicial review.

²⁵ *In re Debs*, 158 U. S. 564, 15 S. Ct. 900 (1894).

²⁶ See FRANKFURTER and GREENE, *THE LABOR INJUNCTION* 142-143 (1930); WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 269 (1932).

²⁷ *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172 (1921).

²⁸ *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 47 S. Ct. 522 (1927).

²⁹ *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72 (1921).

Act, in the face of the fact that nobody then knew (nor even, for that matter knows now³⁰) any specific rules governing the difference between "legitimate" labor activity and activity which transcends the bounds of lawfulness? Imperfect draftsmanship or labor's failure or refusal to read plain English was probably more responsible for the miscarriage which the Clayton Act suffered at the hands of the judiciary than was the alleged judicial unfriendliness to organized labor.³¹

Use of the words "legitimate" and "lawful" in connection with activities permitted to labor under the Clayton Act was perhaps insufficient to justify the vitiating interpretations in the *Duplex* and *Bedford* cases and especially in the *American Steel Foundries* case. But with much less excuse does the Supreme Court of the United States now, in disregard of Congressional refusal to go further than to permit "lawful" and "legitimate" labor activities, assume the power to amend the Clayton Act and, in the very teeth of the quoted words, to state that "licit and the illicit under Section 20 are not to be distinguished...."³² There appears to be a conspiracy abroad against the judicial process. Anti-injunction legislation reflects a purpose to shield an area surrounded by a definition of the words "labor dispute" from judicial intrusion. The *Hutcheson* case goes one step further, to deny to the judiciary any lawmaking function, whether in connection with antitrust legislation or anti-injunction laws, as regards labor activities. The task of distinguishing the unreasonable from the reasonable, which the United States Supreme Court assumed under the Sherman Act in connection with business combinations and restraints, is now denied by the very same Court to judicial tribunals where labor combinations and restraints are concerned,³³ and this in spite of the fact that

³⁰ The authorities are agreed that labor activity carried on for less hours, more wages, or better conditions of immediate employment is legal at common law, but beyond that there is hopeless disagreement. The cases have given both affirmative and negative answers to the question whether labor unions may strike, picket or boycott for such objects as the closed shop, or to procure discharge of a disliked fellow employee, or to obtain the reinstatement of an allegedly wrongfully discharged employee, or to compel observance of a collective bargaining agreement. See I TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, §§ 82-102, 114, 149 (1940). See also, *infra*, note 99.

³¹ Indeed, the circuit court of appeals in the *Duplex* case went so far as to characterize § 20 of the Clayton Act as "blindly drawn." See *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 475, 41 S. Ct. 172 (1921).

³² *United States v. Hutcheson*, 312 U. S. 219 at 232, 61 S. Ct. 463 (1941).

³³ See *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502 (1910); *United States v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632 (1910); *United States v. United Shoe Machinery*, 247 U. S. 32, 38 S. Ct. 473 (1917). Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811 (1940),

the Sherman Act does not pretend to separate, while the Clayton Act at least purports to distinguish, the lawful from the unlawful.

"Outsiders" to Labor Controversies

The Department of Justice apparently anticipated the application of the Clayton Act to the controversy. It was therefore alleged in the indictment³⁴ that the defendants, officers and agents of the Carpenters, were not employees of Anheuser-Busch. A foundation was thereby laid for the argument that they were not entitled to the benefits, if any, of the provisions of section 20 of the Clayton Act even though the underlying controversy was a "labor dispute" under the act. This argument Justice Frankfurter in the *Hutcheson* case assumed, whether arguendo or in fact, to be correct. He cited the *Duplex* case in support of the argument. Upon this assumption, he found it necessary to consider the effect of the Norris Act, and to hold that the definition of the words "labor dispute" in that act, in terms unlimited to a controversy between an employer and his employees,³⁵ expressed a public policy which had the effect of amending both the Sherman and Clayton Acts. It is submitted that the assumption was unnecessary, that the *Duplex* case does not support it, and that the *Bedford* case undermined whatever implied support the *Duplex* case may have given to the assumption.

The *Duplex* case was a secondary strike and boycott enjoined, under the Sherman Act as amended by the Clayton Act, by the employer involved in the primary dispute and against whom the enjoined labor organization had called a strike. The exemptions contained in section 20 of the Clayton Act were held to confer no immunity upon those engaged in the secondary boycott because, in the light of the restricted

rehearing denied in 310 U. S. 658, 60 S. Ct. 1091 (1940). Labor also complained that the standard of reasonableness was incapable of application to it: "As applied to combinations of capital, this concept is reducible to fairly workable terms, since it is relatively simple to ascertain prevailing and generally approved business practices. But in labor cases there is no such criterion and the personal attitude of members of the court is given virtually free reign." 43 HARV. L. REV. 459 at 462 (1930).

³⁴ In the District Court of the United States for the Eastern District of Missouri, Eastern Division, September Term, 1939, *United States of America v. William L. Hutcheson et al.*, Indictment, No. 2131, p. 13, ¶ 27.

³⁵ "When used in this act, and for the purposes of this act . . . (c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 47 Stat. L. 73 (1932), 29 U. S. C. (1934), § 113.

definition of the words "labor dispute" set forth in the section, no labor activity could be legally directed "against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce—and this where there was no dispute between such employers and their employees respecting terms and conditions of employment."³⁶ It is true that the Court also said that "section 20 [cannot] be regarded as bringing in all members of a labor organization as parties to a 'dispute concerning terms or conditions of employment' which proximately affects only a few of them,"³⁷ but these words must be understood in the context of the facts of the case, which were those of a secondary boycott. "In essence," the Court stated, "it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees."³⁸ The injunction order authorized was limited to secondary boycott activities, the Court concluding its specific words of restraint with the sentence: "Other threatened conduct by defendants or the associations they represent, or the members of such associations, *in furtherance of the secondary boycott should be included in the injunction according to the proofs.*"³⁹

The *Bedford* case, like the *Duplex* case, was a secondary strike and boycott, the Court indeed stating in the former case that "With a few changes, in respect of the product involved, dates, names, and incidents, which would have no effect upon the principles established, the opinion in *Duplex Printing Press Co. v. Deering* might serve as an opinion in this case."⁴⁰ No distinction was made between the employees' rights and the privileges of the labor organizations to which the employees belonged. The secondary feature of the labor activity was the sole ground of illegality, the Court stating that its holding was not to be construed as a general censure of the defendants' "right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves *or their organizations.* . . ." ⁴¹

The *Hutcheson* case thus gave a breath of life to a refinement barely

³⁶ *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 at 471, 41 S. Ct. 172 (1921).

³⁷ *Id.*, 254 U. S. at 472.

³⁸ *Id.*, 254 U. S. at 474.

³⁹ *Id.*, 254 U. S. at 479 (*italics supplied*).

⁴⁰ *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37 at 49, 47 S. Ct. 522 (1927).

⁴¹ *Id.*, 274 U. S. at 54 (*italics supplied*).

supported, if at all, by anything said or held in the *Duplex* case. One may well wonder over the reasons for such life-giving, since they failed to evidence any purpose either to restrict the Clayton Act to the detriment of labor, or to resuscitate the *Duplex* case. On the contrary, as has been seen, the *Hutcheson* case is important to labor relations law because it reread the Clayton Act as a broad amendment to the Sherman antitrust law, and because it repudiated the *Duplex* case. It went a step further. It reached out to the Norris Act and related it to the Sherman and Clayton laws. We are thus led to a consideration of the most significant aspect of the holding in the *Hutcheson* case, to the effect that the Norris Act must be read as an amendment of the Sherman Act, and that labor conduct insulated against injunction in the former law is by the same token immune from prosecution under the Sherman Act.

The Scope and Purpose of the Norris Act

Our legal ancestors in England preferred to think about substantive law in terms of the forms of action, and we have undoubtedly inherited a disinclination to separate rights from remedies. But while early England needed a Statute of Westminster II to broaden the field of available remedies, much of modern American law is the record of restrictions upon remedies and the differentiation of substance from procedure. Procedural limitations have not, however, in the past been identified with substantive impairment. *A*'s contract to marry *B* has been declared unremediable by statute,⁴² but few would therefore question the social interest in the making of the contract,⁴³ and *C* would not be permitted to deny the validity of his promise to provide *A* and *B* with a dowry.⁴⁴ If picketing be the exercise of the right to free speech,⁴⁵ the breach by a labor union of its collective bargaining agree-

⁴² See N. Y. Laws (1935), c. 263, Civil Practice Act, § 61-c, because

"A heart that can be cured by balm

Is nothing but an itching palm."

⁴³ At common law punitive damages are permitted for the breach of a contract to marry, 1 SEDGWICK, DAMAGES, 9th ed., §§ 351, 370 (1912), in spite of the general rule denying such damages for repudiation of contract. 2 *id.*, § 603.

⁴⁴ *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807 (1918).

⁴⁵ *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568 (1941). The nature and extent of the identification of picketing with free speech are in an unsettled state. The cases which have announced the identification have involved picketing of a business (not a home) in connection with a labor dispute (not any other kind of dispute, such as a race dispute). In the *Swing* case, *supra*, the Court held the state of Illinois incompetent to declare picketing in the absence of a strike illegal, as part of its common-law policy. The Supreme Court of the United States had theretofore recognized the right of a state, by statute narrowly drawn to the economic exigency, to regulate picketing. *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736 (1940); *Carlson v. California*, 310 U. S. 106, 60 S. Ct. 746 (1940).

ment not to picket would presumably be unenjoinable, but it would seem incontrovertible that the picketing would nevertheless be tortious and redressable in damages.⁴⁶ Trade libel is generally held unenjoinable for similar reasons,⁴⁷ but damages for the wrong have never been denied.⁴⁸ Reasons of policy, whether found in constitutional precepts,⁴⁹ common-law traditions⁵⁰ or legislative enactments⁵¹ have in innumerable instances qualified remedies of one kind or another without other prejudice to the substantive rights thereby qualified.⁵²

Whatever the force of these circumstances in connection with the general law, they are applicable with perhaps greatest force to the labor injunction. Labor's most cogent quarrel with the labor injunction has been, if the history of its complaint is subjected to even the most cursory examination, that the wrongs, if any, perpetrated by labor unions and their activities should be remedied by sanctions more fairly related to the given tortious conduct.⁵³ In England, it has been pointed out, the judiciary never discovered the jurisdictional requirements necessary to utilization of the labor injunction,⁵⁴ but preferred rather to deal with labor with the aid of the battery of legal sanctions other-

⁴⁶ The measure of damages, loss of business, is not always clear. See I TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, § 219 (1940); Green, "Damages for Loss of Future Profits Arising from Interference with Business," 103 N. Y. L. J. 256, 276 (1940).

⁴⁷ See DERENBERG, *TRADE-MARK PROTECTION AND UNFAIR TRADING* 137 et seq. (1936); Pound, "Equitable Relief against Defamation and Injuries to Personalities," 29 HARV. L. REV. 640 (1916).

⁴⁸ See *Emack v. Kane*, (C. C. Ill. 1888) 34 F. 46 (also denying the generality of the rule forbidding injunctions in restraint of trade libel).

⁴⁹ Because of the constitutional proscription against involuntary servitude, strikes are said to be unenjoinable. *Illinois Malleable Iron Co. v. Michalek*, 279 Ill. 221, 116 N. E. 714 (1917); *Booth & Bro. v. Burgess*, 72 N. J. Eq. 181, 65 A. 226 (1906).

⁵⁰ As, for example, that equity is an "extraordinary" remedy as distinguished from the situation under the civil law.

⁵¹ Actions to recover damages for seduction are abolished by N. Y. Laws (1935), c. 263, Civil Practice Act, § 61-c. But criminal prosecution for seduction is still possible. 39 N. Y. Consol. Laws (McKinney, 1938), "Penal Law," § 2175.

⁵² *A's* oral agreement with *B* may, in the given case, be unenforceable because of the statute of frauds, but *C* may nevertheless be held liable for inducing *A* to breach the agreement. 2 WILLISTON, *CONTRACTS*, rev. ed., § 530 (1936).

⁵³ FRANKFURTER and GREENE, *THE LABOR INJUNCTION* (1930). "*The Labor Injunction* shows, taken in its entirety, that the authors were most disturbed about the ease and informality with which business men throttled union self-help organizational and bargaining pressures without according the unionists the guarantees of due process inherent in the ordinary civil action for damages with its pleading stage and trial by jury, and in ordinary criminal proceedings with indictment or information and trial by jury." 8 UNIV. CHI. L. REV. 502 at 506 (1941).

⁵⁴ FRANKFURTER and GREENE, *THE LABOR INJUNCTION* 20-21 (1930).

wise available, such as nuisance, trespass, civil and criminal conspiracy or disorderly conduct. Labor argued unsuccessfully in the famous *Debs*⁵⁵ case that police protection, not the mandate of injunction, should have been afforded to the aggrieved complainant.⁵⁶ Many years of agitation subsequent to the *Deb* case preceded the day when labor finally succeeded in obtaining anti-injunction legislation⁵⁷ which required, as a condition to the entry of an injunction order in a case involving a "labor dispute," a showing by the party aggrieved that police protection was inadequate to the occasion.⁵⁸ And in spite of anti-injunction statutes, state courts have continued to censure labor activities both violent⁵⁹ and peaceful⁶⁰ through the use of sanctions unrelated to the injunction.⁶¹

The whole framework of the sanction of conspiracy and its underlying notion of restraint of trade by virtue of which the judicial process has assumed the prerogative of testing the legality of labor activity has, to be sure, been ceaselessly attacked by legal scholars, labor leaders and labor lawyers.⁶² To the extent that the sanction of conspiracy

⁵⁵ *In re Debs*, 158 U. S. 564, 15 S. Ct. 900 (1894).

⁵⁶ ". . . it is said by counsel in their brief: . . . The strong hand of executive power is required to deal with such lawless demonstrations. The courts should stand aloof from them and not invade executive prerogative," to which the Court replied: "The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the termination of questions of right and wrong between individuals, masses, and States." *In re Debs*, 158 U. S. 564 at 596, 598, 15 S. Ct. 900 (1894).

⁵⁷ Montana, California, Oklahoma, Kansas and Arizona enacted limited anti-injunction statutes prior to the enactment of the Clayton Act, which sired a greater number of state prototypes. See 2 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, §§ 426-432 (1940).

⁵⁸ Wisconsin was the first jurisdiction to link police protection to the labor injunction. Wis. Laws (1931), c. 56, Stat. (1939), § 133.07. The Norris Act, passed a year later, made the link a part of the federal law, and a host of state laws followed, all of which were fashioned more or less upon the federal act. 2 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, § 434 (1940).

⁵⁹ See *People v. Ward*, 272 N. Y. 615, 5 N. E. (2d) 359 (1939) (noisy, violent, intimidating picketing, congestive of traffic).

⁶⁰ *People v. Bellows*, 281 N. Y. 67, 22 N. E. (2d) 238 (1939) (secondary picketing). But see *People v. Muller*, 286 N. Y. 281, 36 N. E. (2d) 206 (1941).

⁶¹ Both the *Ward* case and the *Bellows* case involved application of the sanction of disorderly conduct.

⁶² See Sayre, "Criminal Conspiracy," 35 HARV. L. REV. 393 (1922).

found expression in antitrust legislation, labor sought and in some instances obtained enactments amendatory of such legislation.⁶³

The injunction and antitrust legislation were thus, in the minds of those closely connected with the life of labor law, separate compartments. The nub of judicial unfriendliness common to both compartments was insistence upon the right to a free and open market. That different remedies with differing implications arose out of this common nub is nothing new to the common law, predisposed as it has always been to the forensic as opposed to the metaphysical basis of law. Labor's quarrel with the injunction has been not so much with its substantive law basis as with the characteristics of the remedy itself. When Congress, after having enacted the Clayton Act in partial amendment of the Sherman law, again directed its attention to the subject of labor relations, it preferred to pass an anti-injunction statute. The public policy which it declared in that statute was a preamble to that statute and that alone, and the definitions and immunities therein contained were affixed not to a broad enactment generally applicable but to an anti-injunction statute applicable to but a single remedy among a host of others.

That the Norris Act should have been broadened, nay distorted into an amendment of the Sherman and Clayton Acts by a Court subscribing to an opinion written by Justice Frankfurter, is all the more incomprehensible because he is a high ranking authority on the labor injunction who participated in the drafting of the Norris Act and who disclaimed any purpose in the Norris bill to affect remedies other than the labor injunction. Adverting, in his work *The Labor Injunction*,⁶⁴ to the possible objections to the constitutionality of the proposed law and more particularly to the eventuality that the courts might reason, as in *Truax v. Corrigan*,⁶⁵ that an aggrieved plaintiff might thereby be made remediless, he said: "No such interpretation is possible for the proposed bill, which explicitly applies only to the authority of United States courts 'to issue any restraining order or injunction.' All other remedies in federal courts and all remedies in state courts remain available."⁶⁶ The learned Justice has now abandoned the "explicit" and,

⁶³ Statutes amending antitrust legislation in favor of labor have been enacted in Colorado, Iowa, Montana, New Hampshire, New York, Oregon, Texas and Virginia. States also have statutes excepting labor from the sanction of conspiracy. 2 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, §§ 455, 456 (1940).

⁶⁴ FRANKFURTER and GREENE, *THE LABOR INJUNCTION* (1930).

⁶⁵ 257 U. S. 312, 42 S. Ct. 124 (1921).

⁶⁶ FRANKFURTER and GREENE, *THE LABOR INJUNCTION* 220 (1930).

embarking upon a line of reasoning as startling, it is submitted, as it is ungrounded by the force of logic or the facts of history, to decide that "all other remedies" do *not* "remain available." Consistency is a dubious virtue in the face of changing sociological patterns. But prior sentiments may and in the case of the Norris Act do reveal a Congressional intent to deal with the labor injunction *qua* labor injunction, without impairing the efficacy of other legal sanctions. "Explicit" is the fortification which Justice Frankfurter gave to the limited purpose of the Norris Act in justifying clause (e) of section 7 of that act, requiring a showing of inadequacy of police protection as a precondition to obtaining injunctive relief against excessive labor activity:

"... Clause (e) aims at judicial confirmation of the conventional assertion by complainants who seek injunctions that the normal police facilities are inadequate to cope with the situation. Violence and other breaches of the peace are concededly the primary concern of the police and the machinery of the criminal law. To require, therefore, proof by complainant to the court's satisfaction that the normal resources of government 'are unable or unwilling to furnish adequate protection' emphasizes official responsibility and at the same time checks dangerous shortcuts in the enforcement of the criminal law."⁶⁷

The Court in the *Hutcheson* case believed that the Norris Act evidenced a declaration of public policy which qualified the Sherman and Clayton laws. In the light of the limited purpose of the Norris Act, it is questionable whether it ought properly to be construed as a legislative declaration of public policy against the background of which both the Sherman Act and the Clayton Act must be read. A prior statute may, to be sure, require revised interpretation in line with the public policy announced in subsequent legislation. The traditional prescription against repeal by implication is out of tune with the realities of the legislative process, just as the law-finding as opposed to the law-making viewpoint is at variance with the judicial process.⁶⁸ But Congress never announced any generally applicable policy against limiting labor disputes to employer-employee controversies. On the contrary, the definition of the words "labor dispute" in the Norris Act was limited to the specific purposes of the act, and Congress omitted from the Norris Act a provision similar to that contained in section 20 of

⁶⁷ Id. 222.

⁶⁸ See Landis, "Statutes and the Sources of Law," HARVARD LEGAL ESSAYS 213 (1934).

the Clayton Act, to the effect that "nor shall any of the acts specified in this paragraph be considered or held to be violations of any laws of the United States."

The Supreme Court of the United States has only recently expressed strong disapproval of any rule limiting labor activity to cases involving disputes between an employer and his employees.⁶⁹ It would seem that the high court translated this dissatisfaction, rather than any legislative declaration, into an extension of the Norris Act.

A single, unequivocal clue to Congressional intent is seldom found in debates had or pronouncements made in connection with given legislation. Opposing contentions with respect to the legislative purpose in enacting the Sherman Act as applied to labor controversies have left the subject in a state of chaotic charges, counter-charges and confusion.⁷⁰ The same can be said of the Clayton Act.⁷¹ Outstanding because rare indeed, therefore, is the unanimity with which legal scholars and the available data agree upon the limited purpose of the Norris Act.⁷² All this was disregarded by Justice Frankfurter, who, though one of the careful students of history, preferred instead to substitute a tenuous process of reasoning in aid of the emasculation of the Sherman and Clayton Acts.⁷³

It is well to conclude this portion of the discussion with a consideration of the most patent source of meaning in connection with legislation, e.g., the plain words themselves. If Congress had intended, in enacting the Norris Act, to qualify the Sherman and Clayton Acts, why

⁶⁹ *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568 (1941); *Journeyman Tailors Union v. Miller's, Inc.*, 312 U. S. 658, 61 S. Ct. 732 (1941). See also *Bakery & Pastry Drivers' Union v. Wohl*, (U. S. 1941) 61 S. Ct. 1108, reversing *Wohl v. Bakery & Pastry Drivers' Union*, 284 N. Y. 788, 31 N. E. (2d) 765 (1941).

⁷⁰ Compare BERMAN, *LABOR AND THE SHERMAN ACT* (1930); Boudin, "The Sherman Act and Labor Disputes," 40 *COL. L. REV.* 14 (1940); Shulman, "Labor and the Anti-Trust Laws," 34 *ILL. L. REV.* 769 (1940); with LANDIS, *CASES ON LABOR LAW* 37 (1934), and *Loewe v. Lawler*, 208 U. S. 274, 28 S. Ct. 301 (1908).

⁷¹ Compare FRANKFURTER and GREENE, *THE LABOR INJUNCTION* (1930); WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932), with *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172 (1921).

⁷² See FRANKFURTER and GREENE, *THE LABOR INJUNCTION* (1930); Frankfurter and Greene, "Congressional Power over the Labor Injunction," 31 *COL. L. REV.* 385 at 408 (1931).

⁷³ Neither in the concurring opinion of Justice Stone, nor in the dissenting opinion of Justice Roberts, in which the Chief Justice joined, did the Court's reasoning receive hospitable reception. See also Landis, "The Apex Case," 26 *CORN. L. Q.* 191 (1941); Gregory, "The New Sherman-Clayton-Norris-La Guardia Act," 8 *UNIV. CHI. L. REV.* 503 (1941).

did it not say so? When the Clayton law was enacted in 1914, Congress was careful to include in section 20 thereof a provision stating that the acts thereby insulated from injunction were also to be held non-violative of "any law of the United States." Certainly the judicial experience had under the Clayton Act did not justify relaxed care in fashioning the words which went into the provisions of the Norris Act.⁷⁴ Unlike the Norris Act, its predecessor the Wisconsin anti-injunction act⁷⁵ expressly provided that the labor activities insulated from injunctive relief should likewise be "legal," and hence uncensurable through force of other legal sanctions, and the recent New Jersey anti-injunction act,⁷⁶ patterned somewhat upon the Norris Act, declares that the activities insulated from injunctive relief shall likewise be held to constitute neither tort nor nuisance.⁷⁷

RESULTING LEGAL DOCTRINE

The regime of free enterprise must now look to a new statute, the Sherman-Clayton-Norris Act, for protection against illegal labor activity. This apparently means that courts are deprived of jurisdiction to inquire into the background of the given labor controversy, or to determine the legality of labor objectives.⁷⁸ It would also seem to mean that if the given activity is a "labor dispute" under the new act no-

⁷⁴ "The purpose of the [Norris] bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. REP. 669, 72d Cong., 1st sess. (1932), p. 3.

⁷⁵ Wis. Stat. (1939), § 103.53.

⁷⁶ N. J. Laws (1941), c. 15.

⁷⁷ Id., § 1.

⁷⁸ The Supreme Court of the United States has settled it that the Norris Act "does not concern itself with the background or the motives of the dispute." *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 at 561, 58 S. Ct. 703 (1938). The stated activity in the following cases has been held to constitute a "labor dispute" within the meaning of the Norris Act: *Rohde v. Dighton*, (D. C. Mo. 1939) 27 F. Supp. 149 (picketing of a theatre whose owner operated the theatre himself and without the aid of any employees); *Wilson & Co. v. Birl*, (D. C. Pa. 1939) 27 F. Supp. 915, affd. (C. C. A. 3d, 1939) 105 F. (2d) 948 (secondary picketing and boycotting); *Lauf v. Shinner & Co.*, 303 U. S. 323, 58 S. Ct. 578 (1938) (picketing in the absence of a strike); *New Negro Alliance v. Sanitary Grocery Co.*, supra (race picketing where connected with an employment controversy); *Wilson & Co. v. Birl*, supra (striking or picketing in breach of agreement). The cases decided by lower federal courts holding given controversies not to constitute labor disputes [see I TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, §§ 210, 211 (1940)] are no longer trustworthy in the light of the holding by the United States Supreme Court in *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U. S. 91, 61 S. Ct. 122 (1940).

where to be found in the statute books, it is uncensurable even if the activity be carried on with the design of narrowing or suppressing the interstate market,⁷⁹ so as otherwise to come within the purview of the Sherman Act. It is an open question whether violence or fraud, if intended to result and resulting in control of or restriction upon the interstate market, is censurable under the Sherman Act. Both violence and fraud are enjoined under the Norris Act, but only after compliance with the preconditions to the obtaining of injunctive relief under the act.⁸⁰ It is barely possible that prosecution under the Sherman Act in a labor case involving violence or fraud might be held improper because constituting an attempt to short-cut the conditions imposed in the Norris Act.⁸¹

Restrictive interpretations of the *Hutcheson* case may take two forms, both of which, however, appear upon consideration to be untenable. The first would be to construe the case as holding simply that the Sherman and Clayton Acts are unaffected by the Norris law except to the extent that the words "labor dispute" are more broadly defined in the Norris Act. But the Court said it could not believe that "that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison."⁸² This can only mean that conduct insulated from injunction under the Norris Act is likewise shielded from criminal prosecution under the Sherman Act. Moreover, the Norris law is little more than the Clayton Act with the words "lawful" and "legitimate" omitted,⁸³ since the Court deleted these words from the Clayton Act by the process of patent judicial law-making, in holding that "the licit and the illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means,"⁸⁴ the result under either the Clayton statute or the Norris law would generally be the same.

⁷⁹ *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940).

⁸⁰ 47 Stat. L. 71 (1932), 29 U. S. C. (1934), § 107.

⁸¹ See FRANKFURTER and GREENE, *THE LABOR INJUNCTION* 222 (1930). The oft-repeated quarrel with the alleged one-sidedness of the National Labor Relations Act has in the past been met with the answer that labor's malfeasances are adequately censurable under other federal and state laws and with other weapons. S. REP. 573, 74th Cong., 1st sess. (1935), pp. 16-17; Boudin, "The Rights of Strikers," 35 ILL. L. REV. 817 at 837-838 (1941). The *Hutcheson* case has impaired the validity of the answer.

⁸² *United States v. Hutcheson*, 312 U. S. 219 at 234-235, 61 S. Ct. 463 (1941).

⁸³ See WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 277 (1932).

⁸⁴ *United States v. Hutcheson*, 312 U. S. 219 at 232, 61 S. Ct. 463 (1941).

The second limiting interpretation would be to adopt Justice Stone's interpretation of the case as one without the purview of the Sherman Act to begin with. But the substitution of the concurring opinion for the opinion of the Court is highly improbable.

Thurman Arnold's five-point program has been dashed to the ground.⁸⁵ Whether, like Hercules, it can rise again and with greater vigor depends upon Congressional action. Mr. Arnold's effort to restrict the scope of the holding in the *Hutcheson* case⁸⁶ has been confounded by the United States Supreme Court in three indictments recently dismissed on the authority of the *Hutcheson* decision.⁸⁷

The Court in the *Hutcheson* case limited its holding to instances where "a union acts in its self-interest and does not combine with non-

⁸⁵ The policy which Thurman Arnold used as the basis of his drive against illegal labor activities under the Sherman Act was announced on November 20, 1939, by way of a letter written to the Central Labor Union of Indianapolis in response to an inquiry. See 5 LAB. REL. REF. MAN. 1147 (1940). The following forms of labor activity were held indictable:

"1. Unreasonable restraints designed to prevent the use of cheaper material, improved equipment, or more efficient methods;

"2. Unreasonable restraints designed to compel the hiring of useless and unnecessary labor;

"3. Unreasonable restraints designed to enforce systems of graft and extortion;

"4. Unreasonable restraints designed to enforce illegally fixed prices;

"5. Unreasonable restraints designed to destroy an established and legitimate system of collective bargaining (such as jurisdictional strikes, picketing or boycotting). . . ."

⁸⁶ Mr. Arnold announced [9 U. S. L. WEEK 2485 (1941)] that, notwithstanding the *Hutcheson* decision, the following labor activities would be considered illegal under the Sherman Act and prosecuted by the Department of Justice:

1. Where carried on by one union in disregard of another union's certification by the National Labor Relations Board as proper bargaining representative.

2. Where evidencing an intent to erect a tariff wall around a given locality.

3. Where designed to exclude efficient methods of production from building construction.

4. Where directed against small, independent business men.

5. Where effecting artificial price-fixing.

6. Where designed to make work.

⁸⁷ *United States v. Building & Construction Trades Council of New Orleans, La.* (U. S. 1941) 61 S. Ct. 839 (AFL secondary strike in spite of CIO's certification by National Labor Relations Board in proceeding to which AFL was a party); *United States v. International Hod Carriers' & Common Laborers' District Council of Chicago and Vicinity*, (U. S. 1941) 61 S. Ct. 839 (conspiracy to prevent mixers from without the state from shipping truck mixers into the city, upon the ground that labor-saving was thereby effected); *United States v. United Brotherhood of Carpenters & Joiners of America*, (U. S. 1941) 61 S. Ct. 839 (conspiracy by AFL against employers whose employees had chosen CIO after election held under the direction of the National Labor Relations Board). All three cases were decided by the high court on April 7, 1941.

labor groups.”⁸⁸ The extent, however, to which trade-restraining provisions contained in collective bargaining agreements are censurable under this proviso to the case is an open question. Collective bargaining agreements may, to be sure, be arrangements for the exclusion of outsiders, i.e., businessmen desiring without prejudicing union conditions to enter the field in the exercise of the right of free enterprise.⁸⁹ They may also be the means of effectuating trade-restraining⁹⁰ or price-fixing policies.⁹¹ But they are also, and often, legitimate and “reasonable” vehicles for the solution of unstabilized business conditions,⁹² or for combating the runaway shop.⁹³ In preserving the Sherman Act as a federal weapon against monopoly accomplished by labor groups in conjunction with nonlabor groups, the Court in the *Hutcheson* case would seem, inconsistently with its general holding that activities which fall within the definition of a “labor dispute” under the Norris Act are immune from censure under the Sherman Act, to have overlooked section 13(a) of the Norris Act, since the provisions of that section appear to include employer-employee arrangements within the purview of the definition of the words “labor dispute.”⁹⁴ Again, the “rule

⁸⁸ *United States v. Hutcheson*, 312 U. S. 219 at 232, 61 S. Ct. 463 (1941).

⁸⁹ *Belfi v. United States*, (C. C. A. 3d, 1919) 259 F. 822. See also *Converse v. Highway Construction Co.*, (C. C. A. 6th, 1939) 107 F. (2d) 127; *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S. E. 353 (1905); *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457 (1908).

⁹⁰ *Local 167, International Brotherhood of Teamsters v. United States*, 291 U. S. 293, 54 S. Ct. 396 (1934).

⁹¹ *DeNeri v. Gene Louis*, 174 Misc. 1000, 21 N. Y. S. (2d) 993 (1940), *affd.* 261 App. Div. 920, 25 N. Y. S. (2d) 463 (1941); *Manhattan Storage & W. Co. v. Movers & W. Assn.*, 262 App. Div. 332, 28 N. Y. S. (2d) 594 (1941).

⁹² *National Fireproofing Co. v. Mason Builders' Assn.*, (C. C. A. 2d, 1909) 169 F. 259; *Sainer v. Affiliated Dress Mfrs.*, 168 Misc. 319, 5 N. Y. S. (2d) 855 (1938).

⁹³ See *American Fur Mfrs. Assn. v. Associated Fur Coat & Trimming Mfrs.*, 161 Misc. 246, 291 N. Y. S. 610 (1936); *Weitzberg v. Dubinsky*, 173 Misc. 350, 18 N. Y. S. (2d) 97 (1940), *affd.* 259 App. Div. 1008, 21 N. Y. S. (2d) 512 (1940); *American Cloak & Suit Mfrs.' Assn. v. Brooklyn Ladies' Garment Mfrs.' Assn.*, 143 Misc. 319, 255 N. Y. S. 614 (1931); *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N. Y. S. 898 (1936).

⁹⁴ “When used in this act, and for the purposes of this act—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or, when the case involves any conflicting or competing

of reason" in cases involving business restraints⁹⁵ has not thus far been clearly applied, if applied at all, to labor restraints,⁹⁶ or industry-labor⁹⁷ restraints.

THE NEED FOR NEW TOOLS

The effort of the Department of Justice to fashion a consistent policy with the aid of the antitrust law is revealed in the *Hutcheson* case to be nothing more than an attempt to build a structure without adequate blueprints.⁹⁸ The law has thus far been unequal to the task of dealing with jurisdictional disputes.⁹⁹ So too, the workingman's as-

interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined). . . ." 47 Stat. L. 73 (1932), 29 U. S. C. (1934), § 113. See *DeNeri v. Gene Louis*, 174 Misc. 1000, 21 N. Y. S. (2d) 993 (1940), affd. 261 App. Div. 920, 25 N. Y. S. (2d) 463 (1941).

⁹⁵ See supra, note 33.

⁹⁶ "No rational principle of labor policy—except possibly the policy that labor unions must 'not be strong'—can harmonize the many decisions of the federal courts in labor cases under the anti-trust laws." Shulman, "Labor and the Anti-Trust Laws," 34 ILL. L. REV. 769 at 777 (1940).

⁹⁷ See comment on the district court decision in the *Hutcheson* case, 26 WASH. UNIV. L. Q. 375 at 388-397 (1941).

⁹⁸ See supra, notes 30, 96; infra, notes 99-102.

⁹⁹ The following is a sketch of the uneven treatment which jurisdictional controversies and labor activity carried on in connection therewith have received at the hands of the law:

1. *At common law.* Picketing by one union where another is under contract with the picketed employer enjoined. *Hotel, Restaurant & Soda Fountain Employees Local Union v. Miller*, 272 Ky. 466, 114 S. W. (2d) 501 (1938). *Contra: Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932), cert. den. 288 U. S. 606, 53 S. Ct. 397 (1933). A boycott carried on by a union composed of musicians who work for wages in bands and orchestras, for the purpose of compelling musical artists who contract for each engagement and employ their own managers to become members of the musicians' union, is for an illegal labor objective and may be enjoined. *American Guild of Musical Artists v. Petrillo*, 286 N. Y. 226, 36 N. E. (2d) 123 (1941).

2. *Under the Norris Act.* Labor activity carried on in connection with a jurisdictional controversy unenjoinable because constituting a "labor dispute." *United States v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463 (1941).

3. *Under the National Labor Relations Act.* A question of representation affecting commerce exists within the meaning of § 9(c) of the act where a conflict exists involving competing unions. *Pittsburgh Steel Co.*, 1 N. L. R. B. 256 (1936). But not where both unions are affiliated with a common parent labor organization. *Aluminum Company of America*, 1 N. L. R. B. 530 (1936). Craft-industrial disputes (usually between AFL and CIO) are resolved by use of a formula known as the "Globe doctrine," under which crafts are permitted in the first instance to choose between separate craft representation or inclusion in an industrial unit. *Globe Machine & Stamping Co.*, 3 N. L. R. B. 294 (1937). See *Bendix Products Corp.*, 15 N. L. R. B. 965 (1939). The board formerly held that the "Globe doctrine" has no general application to a case where employees have once bargained upon the basis of an industrial unit. *Milton Bradley Co.*, 15 N. L. R. B. 938 (1939). This, however, is apparently no longer the board's view. See *Mullins Mfg. Corp.*, 31 N. L. R. B., No. 86 (1941).

The board in the past favored larger bargaining units in disregard of the wishes of the employees in component parts of the unit. Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 (1939); Shipowners' Association of the Pacific Coast, 7 N. L. R. B. 1002 (1938). Today the tendency is in the opposite direction. Libby-Owens-Ford Glass Co., 31 N. L. R. B., No. 38 (1941); Shipowners' Association of the Pacific Coast, 32 N. L. R. B., No. 124 (1941). A collective bargaining agreement is a bar to a rival union's claim to representation for a period of one year. N. L. R. B., *FOURTH ANNUAL REPORT* 75 (1939). Compare Eaton Mfg. Co., 29 N. L. R. B., No. 12 (1941). See also *Triboro Coach Corp. v. State Labor Relations Board*, 286 N. Y. 314, 36 N. E. (2d) 315 (1941). See also, as to the effect of an employer's discharge of members of one competing union under pressure of another union, *Star Publishing Co.*, 4 N.L.R.B. 498 (1937), modified by *New York & Cuba Mail Steamship Co.*, N. L. R. B. Pub. R-4745 (mimeographed advance sheets, July 3, 1941).

4. *Under the Norris and National Labor Relations Acts combined.* Picketing by one union after another has been certified by the board has been held not to constitute a "labor dispute" under the Norris Act and hence enjoined. *Oberman & Co. v. United Garment Workers*, (D. C. Mo. 1937) 21 F. Supp. 20. But see *Sharp & Dohme v. Storage & Warehouse Employees Union*, (D. C. Pa. 1938) 24 F. Supp. 701; *Cupples Co. v. American Federation of Labor*, (D. C. Mo. 1937) 20 F. Supp. 894.

5. *Under state anti-injunction acts patterned more or less closely upon the Norris Act.* Picketing by one union of an employer under contract with another certified by the State or National Labor Relations Board is illegal and may be enjoined. *Bloedel Donovan Lumber Mills v. International Wood Workers of America*, 4 Wash. (2d) 62, 102 P. (2d) 270 (1940). *Contra*: *Stalban v. Friedman*, 259 App. Div. 520, 19 N. Y. S. (2d) 978 (1940); *Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union*, 262 App. Div. 769, 27 N. Y. S. (2d) 883 (1941).

6. *Under more limited state anti-injunction acts.* Picketing by outside union of employer bound by contract with company union held illegal. *Stockinger v. International Brotherhood of Teamsters*, New Jersey Chancery Court, Sept. 11, 1940, 7 L. R. R. 173 (1940). But on March 13, 1941, a new anti-injunction act fashioned after the Norris Act was passed in New Jersey. *Laws* (1941), c. 15.

7. *Under statutes specifically directed to jurisdictional controversies.* The 1939 amendment, Ore. *Laws* (1939), c. 2, *Comp. Laws* (1940), § 102-906 et seq., to the labor statutes of Oregon provides that a jurisdictional controversy shall be held not to constitute a "labor dispute." But see *American Federation of Labor v. Bain*, (Ore. 1940) 106 P. (2d) 544. A similar statute was enacted in 1939 by Pennsylvania. *Pa. Laws* (1939), Act 163, p. 302; 43 Stat. (Purdon, 1941), § 206d. See also *Wis. Laws* (1939), c. 2; *Stat.* (1939), §§ 103.535, 103.621.

Obstacles to efforts, whether by statute or judicial decision, to limit labor activity in connection with jurisdictional controversies, are contained in the rule forbidding injunctions in restraint of strikes because of the constitutional ban against involuntary servitude [*Goldfield Cons. Mines Co. v. Goldfield Miners' Union*, (C. C. Nev. 1908) 159 F. 500], and in the rule identifying picketing with the constitutional guaranty of free speech. *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568 (1941). But see, as to striking, *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), cert. den. *Weber v. Opera on Tour*, (U. S. 1941) 10 U. S. *LAW WEEK* 3123, and as to picketing *Schwab v. Moving Picture Machine Operators Union*, (Ore. 1941) 109 P. (2d) 600, which was, however, decided prior to *Bakery & Pastry Drivers' Union v. Wohl*, (U. S. 1941) 61 S. Ct. 1108, reversing *Wohl v. Bakery & Pastry Drivers' Union*, 284 N. Y. 784, 31 N. E. (2d) 765 (1941). Cf. *Feinberg*, "Picketing, Free Speech and 'Labor Disputes,'" 17 N. Y. *UNIV. L. Q. REV.* 385 (1940), reprinted 25 *CONTEMPORARY LAW PAMPHLETS*, Series I; *Teller*, "The Legality of Picketing," 28 *CONTEMPORARY LAW PAMPHLETS*, Series I (1940).

served right to protest against the use of labor saving devices has met with both miscarriage and success at the hands of legal doctrine.¹⁰⁰ The attempt by the federal government to proceed under the Antiracketeering Act¹⁰¹ against a labor union and its members for compelling an employer to hire "useless and unnecessary" labor was recently frustrated by the Circuit Court of Appeals for the Second Circuit.¹⁰² Chaos, indeed, is the imprint of the law's quest for a consistent rule to determine the legality of labor objectives.¹⁰³

¹⁰⁰ That labor activity carried on to combat the introduction or use of labor saving devices is legal, is the holding of the following cases, among others: *Bayer v. Brotherhood of Painters*, 108 N. J. Eq. 257, 154 A. 759 (1930); *C. B. Rutan Co. v. Local Union*, 97 N. J. Eq. 77, 128 A. 622 (1925). *Contra*: *Haverhill Strand Theatre v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918); *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), cert. den. (U. S. 1941) 10 U. S. LAW WEEK 3123.

¹⁰¹ 49 Stat. L. 1889 (1936), as amended by 52 Stat. L. 1242 (1938), 18 U. S. C. (Supp. 1938), § 407a.

¹⁰² *United States v. Local 807, International Brotherhood of Teamsters, Chauffeurs and Stablemen*, (C. C. A. 2d, 1941) 118 F. (2d) 684, cert. granted *Local 807 v. United States*, (U. S. 1941) 10 U. S. LAW WEEK 3122. The facts showed that the defendants would approach trucks arriving from out of town into New York, and, informing the owners and drivers thereof that they would be unable to unload without the help of a member of Local 807, offered their services for such purpose. The defendants were convicted in the district court, but the circuit court of appeals reversed. There was no violation of the Antiracketeering Act, said the court, because there was no proof that the defendants extorted money without giving anything in return therefor. The court examined the history of the act, and came to the conclusion (after characterizing the act as "loosely drawn" and "most obscure") that the design of the act was to censure persons obtaining money without giving or offering to give a quid pro quo in return. Since the defendants had offered their services and in instances had actually performed services for the money which they demanded—however unreasonable their demands—they could not be indicted under the Antiracketeering Act.

¹⁰³ Courts have questioned the propriety of the objective for which given labor activity is carried on with the aid not simply of one but of three divergent legal theories:

1. That the judiciary is an intermeddler utilizing such essentially vague if not wholly meaningless words as "restraint of trade" and "conspiracy" to qualify labor's right to insist upon its own terms of employment. See Jaffin, "Theorems in Anglo-American Labor Law," 31 COL. L. REV. 1104 (1931); Sayre, "Criminal Conspiracy," 35 HARV. L. REV. 393 (1922). This notion is an underlying one in connection with anti-injunction legislation, especially the Norris Act and prototype state statutes. See *United States v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463 (1941). Sometimes the same result is reached by asserting that workingmen in combination have the same rights as they would have were they to do the same things individually. *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 A. 230 (1902). "Unless the workers have by agreement, freely made, given up such rights, they may without breach of contract leave an employment at any time separately or in combination, and may demand new terms of employment which in turn must be fixed by bargain." *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928). But see *Opera on*

Against the background of this discordance, the *Hutcheson* case assumes meaning if not also purpose. It has brought to the light of day the confusion and indecision which are the ingredients of our present labor law, federal and state alike.¹⁰⁴ The need is for legislation appropriately directed against labor restraints, in substitution for a substantially,¹⁰⁵ and perhaps even mortally,¹⁰⁶ impaired application to labor of an antitrust statute primarily directed against business restraints.

Tour v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), cert. den. *Weber v. Opera on Tour*, (U. S. 1941) 10 U. S. LAW WEEK 3123.

2. That labor's right to act in combination, whether by striking, picketing or boycotting, should not be denied regardless of conflicting contentions over the social desirability of the objective, so long as the objective is reasonably related to terms and conditions of employment. See *Bayer v. Brotherhood of Painters*, 108 N. J. Eq. 257, 154 A. 759 (1930). Hence a strike to enforce a fine or a penalty is illegal, since unrelated to a quarrel over terms and conditions of employment. *March v. Bricklayers' & Plasterers' Union*, 79 Conn. 7, 63 A. 291 (1906); *Carew v. Rutherford*, 106 Mass. 1 (1870).

The Restatement of Torts appears to adopt this second legal theory. 2 TORTS RESTATEMENT, § 777 (1939). But there is room for debate over the meaning of the words "terms and conditions of employment" under this theory. For example, the Restatement of Torts is of the view that a strike connected with a jurisdictional controversy is one involving "terms and conditions of employment," since the strikers are quarrelling over the question whether they or others should get the work. 2 *id.*, § 784 (d).

3. That labor's objective is open to scrutiny in each case by the judiciary, and the legality of the objective, which is a question of law [*Cornellier v. Haverhill Shoe Mfrs. Assn.*, 221 Mass. 554, 109 N. E. 643 (1915)], depends upon resolution of the issues concerned with social desirability. See *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), cert. den. *Weber v. Opera on Tour*, (U. S. 1941) 10 U. S. LAW WEEK 3123. This is the traditional view.

Mr. Arnold stated that "the question of whether the privilege of collective bargaining has been illegally used depends upon the objective for which it is used. If that objective is legitimate, then there is no *unreasonable* restraint of trade." ARNOLD, *THE BOTTLENECKS OF BUSINESS* 248 (1940). But in the light of the confusion over the theoretical basis of legality of labor union objective, it is difficult to justify recourse to a criminal law to strike down labor activity carried on for an objective deemed unsound by any particular administration.

¹⁰⁴ Paradoxically, the focus of condemnation under the Sherman Act, according to the *Hutcheson* case, is not labor activities but trade-restraining bargains between labor unions and nonlabor groups, such as monopolistic collective bargaining agreements, while these very collective bargaining agreements, even if in restraint of trade, and not labor activities, are exempted from state antitrust acts, notably from the New York act. 19 N. Y. Consol. Laws (McKinney, 1941), "General Business Law," § 340 (2). But see *DeNeri v. Gene Louis*, 174 Misc. 1000, 21 N. Y. S. (2d) 993 (1940), *affd.* 261 App. Div. 920, 25 N. Y. S. (2d) 463 (1941); *Manhattan Storage & W. Co. v. Movers & W. Assn.*, 262 App. Div. 332, 28 N. Y. S. (2d) 594 (1941).

¹⁰⁵ *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940).

¹⁰⁶ *United States v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463 (1941). Cf. *Tunks*, "A New Federal Charter for Trade Unionism," 41 *COL. L. REV.* 969 (1941).